IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-121

DANIEL WALKER, et al.,

Petitioners,

vs.

MALCOLM LITTLE, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. SCOTT,
Attorney General
State of Illinois
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General
188 W. Randolph Street (Suite 2200)
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Petitioners.

JOAN BAINBRIDGE SAFFORD,
Assistant Attorney General
Of Counsel.

KEENAN PRINTING COMPANY (312) 372-0066 365

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OPINIONS

This petition requests this Court to review the judgment of the Seventh Circuit Court of Appeals in its unreported Order of April 22, 1977 (No. 76-1470), attached to this petition as Appendix A. The earlier opinion of the Seventh Circuit Court of Appeals remanding this case to the District Court for the Northern District of Illinois for an evidentiary hearing is attached to this petition as Appendix B. The memorandum opinions of March 8, 1976 and October 22, 1975 of the District Court are attached as Appendix C and Appendix D.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued their Order reversing the judgment of the District Court on March 25, 1977. Petition for rehearing was denied April 22, 1977.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Should the objective test of good faith of *Wood* v. *Strickland* apply to lay prison officials operating in the complex sphere of prison management and under constantly changing concepts of constitutional requirements?
2. Has the Seventh Circuit improperly interpreted the "objective test" of good faith in *Wood* v. *Strickland* and ignored the admonitions of *Pierson* v. *Ray* when it requires lay prison officials to perceive and apply emerging constitutional principles to new fact situations?
3. Were prison officials chargeable with knowledge in 1972–74 that incidents of harassment and sexual abuse by prisoners of other prisoners in safekeeping segregation status violated such prisoners' constitutional rights?
4. Does respondent's complaint, carefully read, state a cause of action for damages pursuant to 42 U.S.C. § 1983 under the law applicable in 1972–74, since he lacked standing to make allegations about attacks on others and the remainder of his claims did not rise to a constitutional level?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 8.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment 14, sec. 1.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

14 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On January 17, 1973, plaintiff Malcolm Little filed a *pro se* complaint individually and on behalf of a class of all other inmates voluntarily placed in safekeeping segregation status in Stateville Penitentiary, Joliet, Illinois against John J. Twomey, Warden, Stateville Correctional Center. In that complaint he alleged that while an inmate at Vienna Correctional Center he had been physically attacked by black, gang-affiliated inmates. He then alleged that after five days in the receiving cell house in Stateville Penitentiary he was given notice of a work assignment in Clothing which he refused because he feared attacks in the unit, which had seventeen blacks and one white inmate. He alleged that officials of Stateville should have known that such an assignment would be unsafe. The plaintiff alleged that he was locked up in investigation for one night, December 13, 1972, and brought before the Disciplinary Committee where he cited "personal reasons" for declining the work assignment and informed them that one of his assailants from Vienna was in Stateville. Plaintiff alleged that he was effectively coerced by his situation into accepting voluntary safekeeping segregation status where he was subjected to the same deprivations as those imposed on involuntary segregees, namely:

1) lack of recreation opportunities
2) loss of work opportunities
3) loss of training opportunities
4) denial of access to law materials and supplies
5) loss of opportunity to attend religious services
6) lack of warm food
7) inadequate medical care

In an addendum to his original allegations he stated that he had witnessed two attacks on other prisoners.

The plaintiff sought injunctive relief requiring the warden to prevent attacks and sexual abuse and to provide reasonable alternatives to segregative safekeeping as a means of protecting inmates from attack.

Plaintiff subsequently filed a series of affidavits in support of the *pro se* complaint on his own behalf (R. 11, 13, 18, 23, 24 and 31), and on behalf of the other inmates of the plaintiff class (R. 9, 10, 19, 20, 21, 22, 27, 28, 32 and 34), detailing threats and incidents of sexual abuse *before* the plaintiffs were transferred to protective segregation. Plaintiff Little stated he had been threatened but did not allege that he personally had ever been violently attacked or sexually assaulted at Stateville. He stated he had seen one Richard Whitely sexually attacked.

In his Supplemental Complaint and Memorandum of Law filed March 5, 1973, plaintiff Little stated that he had never said he was attacked in safekeeping segregation, but that non-segregated inmates walking thirty feet below had on occasion threatened to throw gasoline in his cell (p. 2).

In a later supplement to his complaint he alleged that he had lost personal property and had witnessed sexual assaults on other inmates in segregative safekeeping during a takeover by inmates of Cellhouse B in 1973. (Item 31).

On November 30, 1973, with aid of court-appointed counsel, the plaintiffs filed an amended complaint naming additional prison administrative personnel as defendants. It made general allegations that plaintiffs had been the subject of threats, physical attacks and sexual abuse and that defendants had unreasonably permitted a climate of fear to exist by failing to control violence-prone and gang-affiliated inmates. Plaintiffs were thus compelled to seek

refuge in voluntary segregation. Despite complaints to prison administrators, they had been repeatedly forced to perform unnatural sexual acts through the cell bars or be deprived of their meals served by gang-affiliated inmates. In this amended complaint the plaintiff class added monetary relief to the equitable relief previously sought.

On November 8, 1974, the District Court denied leave to prosecute this case as a class action. This ruling was not appealed. The sole remaining plaintiff, Malcolm Little, had been transferred to Menard Correctional Center on September 4, 1974, thus making injunctive relief no longer appropriate. Therefore, the issue before the District Court was whether the complaint made out a claim upon which monetary relief could be granted to Malcolm Little.

On October 22, 1975, the District Court in a memorandum opinion deferred ruling on defendants' motion to dismiss or for summary judgment and ordered the parties to bring the question of whether, in light of this Court's decision in *Wood* v. *Strickland*, 420 U.S. 308 (1975) and the Seventh Circuit's decision in *Knell* v. *Bensinger*, 522 F. 2d 720 (7th Cir. 1975), the defendants would be subject to a suit for money damages. If the defendants had acted sincerely with the belief they were doing right, the essential question would be whether imposing the identical restrictions on those in voluntary segregation-safekeeping as on those assigned to segregation for disciplinary purposes constituted a recognizable unconstitutional deprivation during the period at issue, 1972-74. (Appendix D).

On March 8, 1976, the District Court in a second Memorandum Opinion dismissed the complaint. It found that nothing was alleged which indicated that "the decision to grant Little's request for segregation, with its limitation on privileges was motivated by actual malice." (Mem. Op.

2, Appendix C attached hereto.) Nor was there anything in the record to "indicate that privileges were withheld from plaintiff for any reason except that such privileges were not available to any prisoner placed in the segregated portion of the prison." Thus defendants satisfied the subjective test of good faith.

With respect to the second prong of the *Wood* v. *Strickland* test of good faith, the District Court stated that there was no case on point in the Seventh Circuit. The Court observed that the only law on point, *Breeden* v. *Jackson*, 457 F. 2d 578 (4th Cir. 1973) had held that "there is nothing impermissible in denying voluntary segregees the same rights denied to those segregated because of their dangerous characteristics." It concluded that the defendants could not be required to guess that another view of the constitutional requirements might be adopted years later in another circuit. As the plaintiff could not "satisfy the requirements of *Wood* v. *Strickland*, his constitutional challenge as set forth in his complaint must fail." (Mem. Op. 3).

The Seventh Circuit Court of Appeals reversed the District Court. It took a different view of the complaint. It read the amended complaint, drawn when the plaintiffs were many, as alleging "[v]iolent attacks and sexual assaults by inmates upon the plaintiff [Malcolm Little] while in protective segregation." (Slip. Op. p. 7, Appendix B) The Seventh Circuit stated that in the critical period May, 1972, to September, 1974, it was already well-settled that the treatment alleged was cruel and unusual punishment. Citing *Knell* v. *Bensinger*, 522 F. 2d at 725, it charged prison officials with a responsibility to be "sensitive to the 'protections afforded prisoners by the developing judicial scrutiny of prison conditions and practices.' "

While not requiring that an official anticipate "unforseeable constitutional developments," he must extrapolate

from settled principles to new fact situations. The Seventh Circuit concluded that if the plaintiff proved his allegations, the defendants would *necessarily* fail to meet the objective test of good faith of *Wood* v. *Strickland* and *Knell* v. *Bensinger*. Therefore, the plaintiff need not show that the defendants had an impermissible motive in their actions in order to establish liability for money damages. On April 22, 1977, the Seventh Circuit Court of Appeals denied a petition for rehearing.

The petitioners (defendants-appellees below) present this petition for certiorari on the grounds that the Court of Appeals has erroneously applied *Wood* v. *Strickland* to the area of prisoners' rights litigation; erroneously interpreted *Wood* v. *Strickland* to require that lay prison officials predict the course of constitutional law; erroneously concluded that the allegations in the complaint describe a settled constitutional violation such that if proved, defendants are to be precluded from asserting a good faith defense; and erroneously reversed the District Court's dismissal of the action for money damages, when the plaintiff had alleged no personal attacks and placing plaintiff in voluntary segregation-safekeeping with its attendant deprivations was constitutionally acceptable practice in the period 1972–74.

REASONS FOR GRANTING THE WRIT

I.

THE OBJECTIVE TEST OF GOOD FAITH OF *WOOD v. STRICKLAND* SHOULD NOT BE APPLIED TO LAY PRISON OFFICIALS OPERATING IN THE COMPLEX SPHERE OF PRISON MANAGEMENT AND UNDER CONSTANTLY CHANGING CONCEPTS OF CONSTITUTIONAL REQUIREMENTS.

In *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974), this court set forth the standards to be applied in determining the qualified immunity available "to officers of the executive branch of government" in a damage action brought under 42 U.S.C. § 1983.

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of Government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U.S., at 247–248. 94 S. Ct. at 1692.

One year later this Court stated that in "the specific context of school discipline" a different two-prong test of good faith would obtain, *Wood* v. *Strickland*, 420 U.S. 308 (1975). First, a school board official must establish that he was "acting sincerely and with a belief that he is doing right", 420 U.S. at 321 [the "subjective test"]; and second, he must conduct himself based "on knowledge of the basic,

unquestioned constitutional rights of his charges." Id. at 322, [the "objective test"].

Despite the limiting words of this decision, the Seventh Circuit relied on this Court's action in remanding cases involving a superintendent of a state hospital for reconsideration in light of *Wood, O'Connor* v. *Donaldson*, 422 U.S. 563, 576-577, to extend the two-prong test to correctional administrators. *Knell* v. *Bensinger*, 522 F. 2d 720 (7th Cir. 1975).

In *Knell* v. *Bensinger*, 489 F. 2d 1014 (7th Cir. 1973) [Knell I] the plaintiff complained that he had been denied his constitutional rights under a regulation denying him access to the courts. The regulation was found unconstitutional and the case remanded for decision on the issue of damages, which were denied. On appeal, the Seventh Circuit, while stating that prisoners' access to the courts was an established constitutional principle, observed that during the period at issue (1971-72) federal courts were generally unwilling to interfere in the problems of prison management. Temporary deprivations as part of a prison disciplinary action were not unreasonable. And it did not represent "such disregard of plaintiff's established constitutional rights as to be reasonably characterized as in bad faith" 522 F. 2d at 727. The Seventh Circuit then affirmed the District Court's dismissal of the civil rights damage action.

The case was therefore an inappropriate one for challenge of the application of *Wood* v. *Strickland* to prison administrative personnel, since the proper result was reached even if partially for the wrong reason. But the very factors recognized by the Seventh Circuit as pertaining to the period 1971-72 still existed in 1972-74 and even to the present.

The problems of prison management have been described by this Court as "complex and intractable, . . . not readily

susceptible of resolution by decree" *Procunier* v. *Martinez*, 416 U.S. 396, 404 (1974). Prison officials must therefore be accorded "latitude in the administration of prison affairs," *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972). "[W]here state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." *Procunier* v. *Martinez, supra*, 416 U.S. at 405.

Correctional officials operating in the tense atmosphere of prison administration are not like school board officials whom this court presumed must have a "high degree of intelligence and judgment for the proper fulfillment of [their duties]" and who exercise their discretion on disciplinary matters in the relative quiet of deliberative proceedings. The Seventh Circuit itself has recognized that prison officials should not be exposed to a "Hobson's choice between alternative Eighth Amendment claims" based on their decisions as how to handle potentially dangerous inmates. *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 721 (7th Cir. 1973).

Moreover, the law of penology or corrections has been evolving so rapidly that there are few areas which could be characterized as being ones of "settled, indisputable law" or "unquestioned constitutional rights." The changing views on access of prisoners to the courts illustrate the point. In *Walker* v. *Pate*, 356 F. 2d 502 (7th Cir. 1966), the Seventh Circuit sustained dismissal of a complaint attacking a regulation limiting the number of personal law books a prisoner could have in his cell and labeled the complaint an invitation for summary disposition. Yet a few years later in *Knell* v. *Bensinger*, 489 F. 2d 1014 (7th Cir. 1973) the Seventh Circuit found short-term denial of access to law materials by prisoners in isolation unconstitutional.

The sharp conflict between the Seventh Circuit and the District Court in the present case provides another illustra-

tion of the difficulty of determining settled law. Also, in recent cases where the court of appeals of various circuits have been in accord on what is constitutionally mandated under the fourteenth amendment, this Court has disagreed. See, *Meachum* v. *Fano*, 96 S. Ct. 2532 (1976), *Montayne* v. *Haymes*, 96 S. Ct. 2543 (1976). How much more difficult for prison officials unschooled in legal analysis to glean and guide their actions by "settled indisputable law" at the risk of pecuniary liability.

This Court should therefore consider whether prison officials' discretionary actions should be measured instead by the standards of good faith set forth in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). Those standards take into account the scope of discretion and responsibilities of the office and all of the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U.S. at 247. They would therefore protect correctional officials who act in reliance on existing procedures which they reasonably believed were valid, without denying pecuniary relief for actions undertaken in bad faith or from which bad faith could be presumed.

II.

THE SEVENTH CIRCUIT HAS IMPROPERLY INTERPRETED THE "OBJECTIVE TEST" OF GOOD FAITH IN *WOOD* v. *STRICKLAND* AND IGNORED THE ADMONITIONS OF *PIERSON* v. *RAY* WHEN IT REQUIRES LAY PRISON OFFICIALS TO PERCEIVE AND APPLY EMERGING CONSTITUTIONAL PRINCIPLES TO NEW FACT SITUATIONS.

Even if the "objective test" of *Wood* v. *Strickland* must be applied to prison officials, this Court should still decide whether the Seventh Circuit has impermissibly tightened

the demanding "objective test" of *Wood* v. *Strickland* as applied to this class of defendants. In *Wood*, this Court required that school board officials act with regard for "settled indisputable law" and on "knowledge of the basic unquestioned constitutional rights of its charges". 420 U.S. at 321-22. In *Knell* v. *Bensinger*, 522 F. 2d 720, 725 (7th Cir. 1975) the Seventh Circuit *in dicta* concluded that this standard required that prison officials "in exercising their informed discretion must be sensitive and alert to the protections afforded prisoners by the developing judicial scrutiny of prison conditions and practices."

The import of this harsh interpretation of *Wood* becomes apparent in the instant case. For this stricture is now applied to require that Illinois correctional officials keep up-to-date with cases throughout the county presenting sharply different fact patterns resulting in often conflicting opinions and to interpolate the protections emerging from those decisions into factual settings which have "never appeared *in haec verba* in a reported opinion" (Op. at 7).

It is the Seventh Circuit's position that "[s]ince constitutional developments prior to the May, 1972-September, 1974 period had crystallized in Little's favor, defendants should have known [that the safekeeping segregation practices in Stateville Penitentiary] would violate his Constitutional rights" (Op. 8-9).

Judging from the lack of a single federal citation prior to 1974 speaking of a plaintiff's safekeeping segregation experience as being cruel and unusual punishment, the Opinion here apparently demands that lay defendants, on pain of damages, infallibly analyze the general run of prisoners' rights decisions of federal courts everywhere and predict how their principles will be applied in later years.

This tightened, demanding "objective" test of defendants' good faith conflicts directly with the admonition against requiring constitutional guesswork on the part of public officials made in *Pierson* v. *Ray*, 386 U.S. at 557, *Scheuer* v. *Rhodes*, 416 U.S. at 247-48 and *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 (1975).

What combination of knowledge and clairvoyance is to be required of lay officials becomes critical in this case because the Seventh Circuit has *precluded* these defendants from putting on evidence of their subjective good faith if plaintiff proves his factual allegations. (Op. 9).

Thus they may be liable in money damages even if they placed defendant in safekeeping segregation in good faith response to his request, in accord with accepted practice in the institution and in accord with their understanding of constitutional requirements.

III.

CONTRARY TO THE SEVENTH CIRCUIT'S OPINION, PRISON OFFICIALS WERE NOT CHARGEABLE WITH KNOWLEDGE IN 1972-74 THAT INCIDENTS OF HARRASSMENT AND SEXUAL ABUSE BY PRISONERS OF OTHER PRISONERS IN SAFEKEEPING SEGREGATION STATUS VIOLATED SUCH PRISONERS' CONSTITUTIONAL RIGHTS.

Whatever standard of good faith is applied, prison officials here could not be expected to know that the conditions alleged were violative of the constitutional rights of their charges.

The Seventh Circuit Court of Appeals read this complaint to allege "[V]iolent attacks and sexual assaults by inmates upon the plaintiff while in protective segregation"* and concluded that placement in such conditions of confinement would evidence a general disregard for plaintiff's established constitutional rights such that defendants could not introduce evidence of their motives. In reaching this conclusion the only pre-1974 case the Seventh Circuit cited was *Holt* v. *Sarver*, 442 F. 2d 304 (8th Cir. 1971). But *Holt* presents an entirely different case and does not settle the constitutional questions at issue here. For in *Holt*, Arkansas had *institutionalized* prisoner abuses of other prisoners by placing trusties, who made up 95 percent of the administrative force, in charge of all aspects of the prison administration. And in *Holt*, there was no damage claim. Moreover, the Seventh Circuit ignored their own opinion in *Kish* v. *County of Milwaukee*, 441 F. 2d 901 (7th Cir. 1971) in which they found that assaults and homosexual attacks which are a result of the physical layout and overcrowding of a jail could not serve as the basis of a claim for damages against a sheriff acting in good faith to promote prison security. How could the present defendants in justice, be required in 1973 to divine that constitutional law had already settled against them so that the conditions alleged made out a constitutional claim for damages irrespective of their good faith, when the only law on the issue in the Seventh Circuit told them otherwise?

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* The complaint with its allegations pertaining to the remaining plaintiff bears little resemblance to the image of it contained in the Court of Appeals Opinion. For Petitioner's argument on this misinterpretation, see Part IV, *infra*.

Defendants submit that under any reasonable application of the test of objective good faith, consideration of the scope of defendants' discretion and the legal and factual circumstances confronting them at the time of plaintiff's protective segregation must lead to the conclusion that they must be permitted to prove their motives in acting as they did.

IV.

RESPONDENT'S COMPLAINT, CAREFULLY READ, DOES NOT STATE A CAUSE OF ACTION FOR DAMAGES PURSUANT TO 42 U.S.C. § 1983 UNDER THE LAW APPLICABLE IN 1972-74, SINCE HE LACKED STANDING TO MAKE ALLEGATIONS ABOUT OTHERS, AND THE REMAINDER OF HIS CLAIMS DID NOT RISE TO A CONSTITUTIONAL LEVEL.

Neither plaintiff Little's complaint nor his accompanying affidavits allege any personal attack at Stateville Penitentiary either before his request for voluntary segregation or after his installation in protective safekeeping-segregation in Level 6 of Cellhouse B.

The general allegations of sexual assaults upon "plaintiffs" while in the general population and in protective segregation were part of the amended complaint, intended as a class action pleading, before the district court refused to certify the case as a class action. After denying certification, the District Court was not required to read the general allegations concerning all plaintiffs as if they applied to each plaintiff individually, particularly where the specific allegations concerning the experiences of the remaining plaintiff contradicted the general allegations. Indeed, the initial complaint makes clear that plaintiff Little was *never* part of the general prison population, but was as-

signed to protective segregation after spending *five* days in Receiving and *one* night in Investigation for refusing his first work assignment. He does allege, with supporting affidavits that other inmates were threatened, physically attacked and sexually abused while residents in the general population and that they requested refuge in safekeeping segregation. He says he saw fights among non-segregated prisoners from his place in segregation. He alleges that as a result of his status in voluntary segregation he was subjected to the same deprivations as those punitively segregated. And he alleged that he was threatened by inmates who shouted at him from the first level thirty feet below.

Respondent was not permitted to prosecute this case as a class action; therefore he had no standing to claim damages for the physical injuries suffered by others. *O'Shea* v. *Littleton*, 414 U.S. 488, 94 S. Ct. 669, 675-77 (1974). He was transferred from Stateville and later released on parole, mooting his claims for injunctive relief.

Therefore the sole issue before the District Court was whether the conditions of his confinement in protective segregation stated a claim for which monetary relief could be granted.

With respect to these deprivations there was no case on point in the Seventh Circuit. The only contemporary case on point from any circuit Court of Appeals was *Breeden* v. *Jackson*, 457 F. 2d 578 (4th Cir. 1972). In that case as here, the plaintiff sought refuge from unconfirmed threats of attack in voluntary segregation and then complained that he was treated like involuntary segregees. The Fourth Circuit found no constitutional violation.

Confinement of plaintiff Little to protective segregation at his own request and under the conditions he alleged pertained *to him* cannot be reasonably described as "vindictive, cruel or inhuman" (Op. at p. 6), any more than could the conditions in *Breeden*. Also, *Breeden's* majority opinion is still the law in the Fourth Circuit, as the specially concurring minority (one of whom is Judge Craven) makes clear in *Sweet* v. *S. Carolina Dept. of Corrections*, 529 F. 2d 854 at 869 (4th Cir. 1975), a case heard *en banc*. And the entire Court of Appeals for the Fourth Circuit, including the minority, agreed that Sweet would not be entitled to damages regardless of what facts were developed on his claimed lack of exercise and frequent showers over the *five years* he was in protective segregation. Judge Butzner, writing for the concurring minority, explained the immunity from damages by saying: "The Warden acted in good faith, and he is entitled to rely on *Breeden* v. *Jackson* until its principles are authoritatively supplanted. Cf. *Pierson* v. *Ray*." (Full citations omitted). 529 F. 2d at 869.

With respect to the question of whether the plaintiff could state a cause of action for damages based on a climate of incarceration which included attacks he alleged were perpetrated upon others, in neither *Woodhaus* v. *Commonwealth of Virginia*, 487 F. 2d 889 (4th Cir. 1973) nor *Holt* v. *Sarver*, 442 F. 2d 304 (8th Cir. 1971), the cases relied on by the Seventh Circuit, did the Court of Appeals suggest that damages would be an appropriate remedy. Both cases concerned only equitable relief.

As the sole remaining plaintiff in this case failed to state a claim upon which monetary relief could be granted, the District Court properly dismissed the action. In ruling to the contrary, the Seventh Circuit Court of Appeals in 1977 re-wrote the law of corrections for the years 1972-74 and completely misread the respondent's complaint.

CONCLUSION

For the foregoing reasons, Petitioners Daniel Walker, et al., respectfully request this Court to issue a Writ of Certiorari.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General
State of Illinois

DONALD B. MACKAY,

MELBOURNE A. NOEL, JR.,

Assistant Attorneys General
188 W. Randolph Street (Suite 2200)
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Petitioners.

JOAN BAINBRIDGE SAFFORD,
Assistant Attorney General
Of Counsel.

APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
April 22, 1977

Before

Honorable THOMAS E. FAIRCHILD, *Chief Judge*
Honorable LUTHER M. SWYGERT, *Circuit Judge*
Honorable WALTER J. CUMMINGS, *Circuit Judge*

No. 76-1470

MALCOLM LITTLE, JR.,

Plaintiff-Appellant,

vs.

DANIEL WALKER, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 134
Bernard M. Decker,
Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendants, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Judge Philip W. Tone disqualified himself from consideration of this matter.

APPENDIX B

No. 76-1470
MALCOLM LITTLE, JR.,

Plaintiff-Appellant,

v.

DANIEL WALKER, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 134—**Bernard M. Decker,** *Judge.*

HEARD DECEMBER 8, 1976—DECIDED MARCH 25, 1977

Before FAIRCHILD, *Chief Judge,* SWYGERT and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Plaintiff, then an inmate of the Illinois State Penitentiary in Stateville, Illinois, filed this civil rights class suit under 42 U.S.C. § 1983 on January 17, 1973. Affidavits filed by plaintiff and by some of the purported class members paint an ugly picture of constant physical attacks and sexual assaults by other inmates. Leave to prosecute the case as a class action was denied; that order of the district court is not questioned in this appeal. On March 29, 1976, plaintiff was placed on parole and therefore is no longer seeking equitable or declaratory relief.

In the amended complaint,[1] plaintiff alleged[2] that from May 1972 until his September 2, 1974, transfer to the Menard Correctional Center, he and other inmates at Stateville "repeatedly suffered acts and threats of physical violence, sexual assaults, and other crimes perpetrated by other inmates from whom plaintiffs were not reasonably protected by defendants." The defendants consist of the Illinois Department of Corrections, its director and former director, the Governor of Illinois, the Warden of the Stateville Penitentiary and his predecessor, the Superintendent of the Stateville Prison, the administrative assistant to the Warden, the chairman of the Stateville Institutional Assignment Committee, and six members of the Disciplinary Committee of the Stateville Prison. The complaint alleged that plaintiff and fellow inmates lived in constant and imminent fear of physical violence and sexual assaults, "especially when inflicted by gang-affiliated inmates."

Defendant Chairman of the Institutional Assignments Committee of the prison supposedly ordered plaintiff and others to work in certain areas of the penitentiary that were controlled by gang-affiliated inmates. Because of fear for their personal safety, plaintiff and others refused to comply with such work assignments and were then committed to isolation and other grievous punishment "at the

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1. The amended complaint was filed on November 30, 1973. Richard L. Whitley was a co-plaintiff as late as March 25, 1974 (R. 64). By at least November 11, 1975, Little was the only plaintiff.

2. All facts alleged of course are taken as true for purposes of our review of the granting of the motion to dismiss below. *Walker Process Equip.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172.

direction of the Disciplinary Committee." To avoid violence-prone and gang-affiliated inmates as well as Disciplinary Committee punishment for refusal to accept work assignments in gang-controlled areas, plaintiff and other inmates accepted placement in "Segregation-Safekeeping" status, sometimes in excess of one year. Such status resulted in:

> "(a) Denial of access to religious services, ministrations, and sacraments;
>
> "(b) Denial of all opportunities of a rehabilitative nature, including educational and vocational instruction;
>
> "(c) Denial of adequate medical and dental treatment;
>
> "(d) Denial of adequate means with which to maintain their cells in a clean and sanitary condition;
>
> "(e) Denial of essentials necessary for personal hygiene, including access to shower facilities at least once a week;
>
> "(f) Denial of access to the prison dining room or to warm food served in a sanitary manner;
>
> "(g) Denial of all indoor or outdoor recreational activity;
>
> "(h) Denial of effective access to the prison law library and the legal materials contained therein;
>
> "(i) Denial of opportunities for parole, work release program or transfer to a minimum security unit or institution." (Amended Complaint ¶ 20.)

Defendants made no distinction between disciplinary and protective segregatees, thereby subjecting plaintiff to the

same restrictions and deprivations imposed on inmates who had committed disciplinary infractions.[3]

Those placed in Segregation-Safekeeping status were confined by defendants in gallery 6 of cell-house B where the inmates most prone to violence are also housed. Those in Segregation-Safekeeping status had meals served to them in their cells by gang-affiliated inmates who "withhold meals from plaintiffs unless plaintiffs perform unnatural sexual acts through the cell bars." Defendants ignored plaintiff's entreaties to remedy the situation.

According to the complaint, on September 6, 1973, through defendants' failure to afford reasonable protection, cell-house B was seized by a group of rebellious inmates for nine hours while gang rapes were inflicted on other inmates. Plaintiff's personal property, including legal material, was destroyed and confiscated. After the rebellion, defendants nevertheless continued to confine plaintiff in the same area with those inmates in disciplinary segregation who had instigated the uprising.

The complaint alleged that Little and other inmates were deprived of their constitutional rights to due process of law, equal protection of the laws, freedom from cruel and unusual punishment, free exercise of religion, freedom of speech and freedom of assembly. The complaint also charged that defendants violated the Illinois Constitution

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3. Plaintiff does not directly attack the constitutionality of depriving a protective segregatee of the same privileges as those withheld from a disciplinary segregatee. "Concerning those deprivations of privileges, plaintiff only seeks damages for defendants' subjective bad faith in imposing those deprivations upon him while in voluntary segregation" (Reply Br. at 4-5).

and certain Illinois statutes, and that defendants acted with malice or reckless disregard for the rights of Little and others. Plaintiff asserted that seven defendants[4] knew or should have known of these abuses and failed to correct them. In sum, the plaintiff maintains these officials failed to provide him reasonable protection from violent inmates and that they subjected him to impermissible privations while in protective segregation. Numerous affidavits were filed to substantiate the charges, and opposing affidavits were filed by some defendants. Plaintiff and his fellow inmates sought compensatory damages of $25,000 and punitive damages of $10,000 apiece, plus costs and reasonable attorneys' fees.

On October 22, 1975, the district court rendered a memorandum opinion refusing to grant defendants' motion to dismiss or for summary judgment on their theory that it was not unconstitutional to cause protective segregatees to suffer the same limitations of general prison privileges imposed on disciplinary segregatees. Judge Decker pointed out that prison segregation units are not *per se* unconstitutional and that the concomitant restriction of prisoner rights in isolation are only impermissible when of a character to shock the conscience or when intolerable in fundamental fairness. Yet the district court also noted that plaintiff was complaining that restrictions for inmates segregated for disciplinary reasons should not be applied to those, as here, who are in segregation for protective purposes. But since the remaining claim, even assuming its

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4. The Governor of Illinois, the Director of the Department of Corrections and his predecessor, the Warden and his predecessor, the Superintendent of Stateville Prison and the administrative assistant to the Warden.

validity, was only for damages, the court addressed the issue of official immunity from damage actions under Section 1983. Citing *Knell* v. *Bensinger*, 522 F. 2d 720, 724-725 (7th Cir. 1975), the Court held that defendants would be immune from damages under Section 1983 if they acted sincerely and with the belief that they were doing right, unless they acted with such disregard of the plaintiff's clearly established constitutional rights that their actions could not reasonably be characterized as being in good faith.[5] Judge Decker ordered further briefing on the official immunity issue.

In a second memorandum opinion handed down on March 8, 1976, the district court decided that defendants did not fail to apply the law as it existed at the time because *Breeden* v. *Jackson*, 457 F. 2d 578 (4th Cir. 1972), held that there was "nothing impermissible in denying voluntary segregees [sic] the same rights denied to those segregated because of their dangerous characteristics"[6] (mem. op. at 2). Echoing the Supreme Court's admonition in *Pierson* v. *Ray*, 386 U.S. 547, 557, the district court refused the imposition of a requirement on defendants which it characterized as a "guess that the dissenting opinion in the leading case might be adopted years later in another circuit" (mem. op. at 2).

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5. The *Knell* standard was derived from *Wood* v. *Strickland*, 420 U.S. 308, 322.

6. Nevertheless, Judge Decker noted that Judge Craven's dissent in *Breeden* has continued to gain support in the Fourth Circuit. See *Woodhous* v. *Commonwealth of Virginia*, 487 F. 2d 889 (4th Cir. 1973).

The district court also found that defendants were not motivated by actual malice. The opinion concluded by holding that plaintiff was not entitled to money damages because he had not satisfied the requirements of *Wood* v. *Strickland*, 420 U.S. 308, as made applicable to prison officials by *Knell* v. *Bensinger*, *supra*. Accordingly, defendants' motion to dismiss was granted. This appeal followed. We reverse and remand.

As noted, the principal reason for the dismissal of the amended complaint was the opinion in *Breeden* v. *Jackson*, 457 F. 2d 578, 580 (4th Cir. 1972). The petitioner there was voluntarily transferred from the general prison population to maximum security because of threats of bodily harm from other inmates. The majority opinion denied him equitable relief or damages because his complaints only "related to limited recreational or exercise opportunities, the prison menu and restricted shaving and bathing privileges."[7] In sharp contrast, Little's alleged treatment was so unreasonable as to be characterized as vindictive, cruel or inhuman or so intolerable in fundamental fairness that even the *Breeden* majority would have found a violation of his constitutional rights. See 457 F. 2d at 580-581. In any event, Judge Craven's dissenting opinion in *Breeden* now appears to have been the rule in the Fourth Circuit since July of 1973. See the 1973 opinion in *Woodhous*, *supra*.

Here the crucial time period for purposes of damages is from May 1972 to September 1974 when Little was transferred to Menard. During that period, it was already well

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7. Breeden also complained that he suffered a denial of any opportunity for parole while he was confined in maximum security at his own request. However, the State established that he was not so prejudiced and, in fact, had been released on parole.

settled that the treatment he received while in Segregation-Safekeeping status was cruel and unusual punishment. See the 1963-1970 authorities cited in *Breeden, supra,* 457 F. 2d at 580-581 nn. 6-9; see also *Haines* v. *Kerner*, 409 U.S. 519. And there is no doubt of the continuing validity of Chief Judge Fairchild's structure in *Knell* v. *Bensinger*, 522 F. 2d at 725:

> "[I]n exercising their informed discretion, officials must be sensitive and alert to the protections afforded prisoners by the developing judicial scrutiny of prison conditions and practices."

Thus while an official "has, of course, no duty to anticipate unforeseeable constitutional developments" (*O'Connor* v. *Donaldson*, 422 U.S. 563, 577), he cannot hide behind a claim that the particular factual predicate in question has never appeared *in haec verba* in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a conclusion of unconstitutionality, a prison official may not take solace in ostrichism.

Such asserted ignorance cannot provide a doctrinal safe harbor to the defendants here. It has been both a settled and first principle of the Eighth Amendment, long before the relevant 1972-1974 period in the instant case, that penal measures are constitutionally repugnant if they "are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,' or [if they] 'involve the unnecessary and wanton infliction of pain.'" *Estelle* v. *Gamble*, —— U.S. ——, ——, 45 LW 4023, 4025 (citations and footnotes omitted). Violent attacks and sexual assaults by inmates upon the plaintiff while in protective segregation are manifestly "inconsistent with contemporary standards of decency." *Id.* "Deliberate indifference" to these happenings "constitutes the 'unnecessary and wanton infliction of pain' proscribed by the

Eighth Amendment." *Id.* Moreover, in the highly publicized landmark case of *Holt* v. *Sarver*, 442 F. 2d 304, 308 (8th Cir. 1971), it was held that under the Eighth Amendment prisoners are entitled to protection from the assaults of other prisoners. See also *Kish* v. *County of Milwaukee*, 48 F.R.D. 102, 103-104 (E.D. Wis. 1969), subsequent disposition affirmed, 441 F. 2d 901 (7th Cir. 1971). Therefore, it is immaterial that Little himself sought refuge in the segregated part of Stateville for bodily protection. On remand, if Little can show that he was deliberately deprived[8] of

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8. In this opinion, we use the term "deliberate deprivation" to denote two species of culpability: actual intent and recklessness. *Kimbrough* v. *O'Neil*, 545 F. 2d 1059, 1061 and n. 4 (7th Cir. 1976) (*en banc*). Actual intent here encompasses both the special intent to deprive the plaintiff of his constitutional rights as well as the general intent to perform the conduct whose "natural consequence" is the deprivation of the plaintiff's constitutional rights. See *Monroe* v. *Pape*, 365 U.S. 167, 187, 207; *Bonner* v. *Coughlin*, 545 F. 2d 565, 567 (7th Cir. 1976) (*en banc*).

Under *Wood* v. *Strickland, supra,* and *Knell* v. *Bensinger, supra,* recklessness under Section 1983 comprehends only an objective standard: whether the conduct is with "such disregard of the [plaintiff's] clearly established constitutional rights that [the] action cannot be reasonably characterized as being in good faith." 420 U.S. at 322; 522 F. 2d at 725. The subjective standard, sometimes a part of definitions of recklessness, corresponding to "white heart/empty head" good faith is not an appropriate component of the definition of reckless behavior sufficient to state a claim under Section 1983 for the deprivation of constitutional rights. Cf. *Sundstrand Corp.* v. *Sun Chemical Corp.*, —— F. 2d ——, —— (7th Cir. 1977) (slip op. at 18-19). While mere inadvertence or negligence cannot support a Section 1983 action raising Eighth Amendment issues, deliberate indifference "[r]egardless of how evidenced"—either by

constitutional rights while confined in cell-house B, he will be entitled to damages.[9] *Black* v. *Brown*, 513 F. 2d 652, 654-655 n. 6 (7th Cir. 1975).

Since constitutional developments prior to the May 1972-September 1974 period had crystallized in Little's favor, defendants should have known that their actions within the sphere of their official responsibility would violate his constitutional rights. *O'Connor* v. *Donaldson*, 422 U.S. 563, 577. Because under the facts alleged defendants have not met an objective good faith standard (*Knell* v. *Bensinger*, *supra*, at 725), Little need not show whether they had a malicious intent or impermissible motivations. *Wood* v. *Strickland*, *supra* at 322. We leave it to the district judge to determine on a fuller record which, if any, of the fifteen defendants[10] was immune or too remotely involved to be held liable.

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actual intent or recklessness—will provide a sufficient foundation. *Estelle* v. *Gamble*, —— U.S. ——, ——, 45 LW 4023, 4025, and authorities cited by Justice Marshall at 4025 nn. 10-12; see also *Hampton* v. *Holmesburg Prison Officials*, 546 F. 2d 1077 (3d Cir. 1976); *Smart* v. *Villar*, 547 F. 2d 112 (10th Cir. 1976).

9. See *La Batt* v. *Twomey*, 513 F. 2d 641-645 (7th Cir. 1975); *Thomas* v. *Pate*, 493 F. 2d 151, 159-161 (7th Cir. 1974), certiorari denied *sub. nom. Thomas* v. *Cannon*, 419 U.S. 879; *United States* ex rel. *Miller* v. *Twomey*, 479 F. 2d 701, 716-721 (7th Cir. 1973), certiorari denied *sub nom. Gutierrez* v. *Dep't. of Public Safety of Illinois*, 414 U.S. 1146; *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967).

10. Only the seven defendants listed in note 4 *supra* were alleged to have actual or constructive knowledge of the material events detailed in the amended complaint.

Reversed and remanded for further proceedings consistent herewith.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MALCOLM LITTLE, JR.,
Plaintiff,
vs.
DANIEL WALKER, etc., et al.,
Defendants.
No. 73 C 134

MEMORANDUM OPINION

Plaintiff Little alleges in this action that his civil rights were violated when he was denied various privileges available to ordinary prisoners because he had chosen to go into "protective segregation". Since injunctive relief is no longer appropriate, the propriety of dismissal depends on the availability of monetary relief.[1]

Under *Knell* v. *Bensinger*, No. 74-1803 (7th Cir. 9/26/75) the *Wood* v. *Strickland*, 420 U.S. 308 (1975), standard applies to monetary relief aginst prison officials. Such damages are available only if officials acted (a) in disregard of the prisoner's constitutional rights, or (b) with impermissible motivation.

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1. This case is discussed more extensively in this court's memorandum opinion filed herein on October 22, 1975.

It is clear that the defendants cannot be held to have failed to apply the law as it existed at the time. The only case in point, *Breeden* v. *Jackson*, 457 F. 2d 578 (4th Cir. 1972), has held that there is nothing impermissible in denying voluntary segregees the same rights denied to those segregated because of their dangerous characteristics. Although Judge Craven's dissent has continued to gain supporters in the Fourth Circuit, *Breeden* remains the rule of that Circuit. *Woodkous* v. *Commonwealth of Virginia*, 487 F. 2d 889 (4th Cir. 1973), cited by Little, does not overrule *Breeden*, and in any case was decided subsequent to the events complained of. There is no Seventh Circuit case in point. Thus, while this court could properly rule that *Breeden* is not controlling in this Circuit in a case seeking injunctive relief, it is clear that the only law on point justified defendants' conduct at that time. Defendants cannot be held to a standard requiring them to guess that the dissenting opinion in the leading case might be adopted years later in another circuit.

Although plaintiff cites various unpleasant incidents suffered both prior and subsequent to his segregation, nothing is alleged which indicates that the decision to grant Little's request for segregation, with its limitation on privileges, was motivated by actual malice.

There is nothing in the record to indicate that the privileges which were withheld from plaintiff after he entered segregation on his own request were denied for any reason except that such privileges were not available to any prisoner placed in the segregated portion of the prison.

Since plaintiff cannot satisfy the requirements of *Wood* v. *Strickland, supra,* his constitutional challenge as set forth in his complaint must fail.

Plaintiff is not entitled to money damages for the denial of privileges while in segregation, and defendants' motion to dismiss should be, and is hereby granted, and the cause is ordered dismissed.

ENTER:

BERNARD M. DECKER,

United States District Judge.

DATED: March 8, 1976.

APPENDIX D

INTHE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MALCOLMN LITTLE, JR.,

Plaintiff,

vs.

DANIEL WALKER, etc., et al.,

Defendants.

No. 73 C 134

MEMORANDUM OPINION

In this action plaintiff Malcolm Little challenges the treatment accorded prisoners in voluntary segregation at Stateville Penitentiary as violative of 42 U.S.C. § 1983. Plaintiff asserts that he was "psychologically coerced" into volunteering for the segregation unit by the threat of constant physical attack and sexual assault which he faced as a member of the general prison population.Affidavits in his behalf state that he was molested by other inmates prior to his decision to go into "segregation-safekeeping" status.

The gist of the complaint is that prisoners who elect segregation-safekeeping suffer the same deprivations of general prison privileges as those inmates assigned to segregation for disciplinary purposes. Plaintiff lists nine specific items, including, among others, denial of effective access to the prison law library, denial of access to religious services, limitation of shower privileges, denial of recreational activity, denial of adequate means with which to maintain a clean cell, etc.

Leave to prosecute this case as a class action was denied by this court on November 8, 1974. Since the filing of the suit, Little has been transferred from Stateville to Menard. Thus the equitable aspects of this case are moot since there is no affected class before the court, and the plaintiff no longer is in the segregation unit. However, plaintiff also seeks damages for the alleged constitutional deprivations he suffered while in protective segregation. Thus the action is not entirely moot.

Defendants have filed a motion to dismiss or for summary judgment.

Defendants' briefs focus heavily on court holdings that the type of restrictions imposed on segregation unit inmates are constitutional. There can be no doubt that such units are not *per se* unconstitutional. *Adams* v. *Pate,* 445 F. 2d 105 (7th Cir. 1971). Nor are the concomittant restrictions of prisoner rights in isolation ordinarily impermissible. Such treatment amounts to unconstitutional deprivation only when it is of a character to "shock" the "conscience" or is "intolerable in fundamental fairness". *Lee* v. *Tahash,* 352 F. 2d 970, 972 (8th Cir. 19765) *See Early* v. *Ogilvie,* No. 73 C 1959 (N.D. Ill., Will, J., Oct. 31, 1973).

But these arguments misconstrue plaintiff's position. Plaintiff does not assert that these restrictions are improper for inmates segregated for disciplinary reasons; his claim is that they should not be applied to those who are in segregation for protective purposes. Plaintiff's position raises interesting constitutional questions which have not been resolved in this Circuit. There is a case in point decided by a divided Court in the Fourth Circuit, *Breeden* v. *Jackson,* 457 F. 2d 378 (4th Cir. 1972), which is not binding upon this court. Thus, it cannot be said with

certainty at this point that there exists no genuine issue of material fact nor that either party is entitled to judgment as a matter of law.

However, as noted above, the only remaining aspect of the prayer for relief is a request for the award of pecuniary damages. Since the filing of the briefs in the instant case, the Supreme Court has handed down its significant decision in *Wood* v. *Strickland,* 420 U.S. 308 (1975). In that case the Court articulated the standards under which school officials might be found immune from damage claims in § 1983 actions:

> "[W]e hold that a school board member is not immune from liability for damages under § 1983 if he knew or should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that the school board members are 'charged with predicting the future course of constitutional law.' *Pierson* v. *Ray,* . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." 20 U.S. at 322.

Although *Wood* v. *Strickland, supra,* was limited to the context of school discipline, the Seventh Circuit has recently concluded that "the two-pronged standard therein articulated applies equally to challenges to the official conduct of correctional administrators." *Knell* v. *Bensinger, et al.,* No. 74-1803 (7th Cir. September 26, 1975).

The factual issues involved in applying the *Wood* v. *Strickland* standard to the instant case have not been addressed by either side. If, in fact, the defendants are entitled to immunity from damage claims under this standard, then plaintiff has no remedy in this court. If immunity is not applicable, then the propriety of identical restrictions on both voluntary and disciplinary segregees remains at issue.

The court therefore reserves its decision on the motion to dismiss the complaint or to grant summary judgment for the defendants. The parties are hereby ordered to submit to the court within 20 days briefs on the question of the applicability of pecuniary damages in the instant suit.

ENTER:
BERNARD M. DECKER,

United States District Judge.

DATED: October 22, 1975.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-121

DANIEL WALKER, et al.,

Petitioners,

vs.

MALCOLM LITTLE, JR.,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General,
188 West Randolph Street – Suite 2200,
Chicago, Illinois 60601,
Attorneys for Petitioners.

JOAN BAINBRIDGE SAFFORD,
Assistant Attorney General,
Of Counsel.

KEENAN PRINTING COMPANY (312) 372-0066

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IN THE

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Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THE DISTRICT COURT WAS NOT REQUIRED TO IGNORE THE SWORN COMPLAINT AND AFFIDAVITS OF PLAINTIFF WHICH CONTRADICTED THE ALLEGATIONS OF THE AMENDED COMPLAINT, AT LEAST AS TO HIM.

The brief for respondent in opposition to the petition for writ of certiorari continues to distort the facts with respect to the conditions experienced at Stateville Correctional Center by the sole plaintiff remaining in this suit, which is now limited to an action for money damages. This same misreading of the complaint and record as it applied to plaintiff Malcolm Little was in part the cause of the erroneous decision made by the Seventh Circuit Court of Appeals.

Respondent states that the well pleaded allegations establish that:

> [R]espondent was repeatedly victimized by acts and threats of physical violence and by sexual assaults while a member of the general inmate population at Stateville Penitentiary . . . [and] lived in constant and imminent fear of attack especially by inmates affiliated with Chicago street gangs. (amended complaint, para. 16)
>
> . . . Fearing for his personal safety, respondent refused to comply with . . . work assignments [in areas controlled by gang-affiliated inmates.] Upon his refusal, petitioner committed respondent to isolation and, at the direction of the prison disciplinary committee, imposed other sanctions upon respondent. (Amended Complaint, para. 17)
>
> . . . [I]n order to escape the constant threat of (1) violence and sexual assault in the general population, and (2) repeated punishment by the petitioner's disciplinary committee for refusal to accept assignments

> . . . respondent was compelled to accept placement in a segregation safekeeping status . . . for over a year . . . (Amended Complaint para. 19)
>
> As the direct result of this segregation status, respondent suffered . . . the same punitive deprivations and restrictions as they imposed on prisoners confined in disciplinary segregation. (Amended Complaint, para. 22)
>
> [B]ecause . . . respondent lived in the same area of the prison where the most violence-prone inmates . . . are housed . . . respondent suffered increased acts and threats of sexual assault and physical violence [which] petitioner . . . refused . . . to remedy. (Amended Complaint, paras. 23, 24)

(Brief of Respondent in Opposition, 3-6)

Paragraph 25 of the amended complaint alleges that defendants failed to provide reasonable protection against an inmate insurrection in which mutinous inmates took over the cell block where the plaintiff was housed. The insurgent prisoners sexually assaulted three other inmates and stole or destroyed property, including legal materials. (Appendix C, p. 5)

Although the amended complaint, which was framed as a class action, made such allegations with respect to a *class* of prisoners (Amended Complaint, paras. 16, 17), that complaint contained *not one specific allegation with respect to Malcolm Little*. Once the request to proceed with the complaint as a class action had been denied,* the court was not obliged to read each allegation in the singular as if it applied to Malcolm Little. This is particularly true

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*The denial of the right to proceed as a class action was not appealed.

since the affidavits which were a part of the original complaint filed January 3, 1973 (Appendix A) and supplementary complaint filed February 28, 1973 (Appendix B) directly contradicted the most serious of the general allegations of the amended complaint, at least as to Little.

The sworn complaint and affidavits establish that Malcolm Little *never* was a member of the general population of Stateville during the subject period but was housed for five days in transfer gallery after his transfer from Vienna Correctional Center: that he *never* was punished for refusing work assignment but instead was placed in investigation status for one night in response to his refusal, and then was assigned to segregation safekeeping status; that he *never* was personally attacked or sexually assaulted in the general population of Stateville Correctional Center (Appendix A, pp. 3-5); and that he *never* was attacked in protective segregation in Stateville Correctional Center. In fact, he vehemently denied that he witnessed sexual abuse or assaults by other prisoners in protective segregation or by other segregated prisoners. (Appendix B, p. 3) The amended complaint itself establishes that Malcolm Little *never* was sexually assaulted or beaten during the inmate take-over of Cellhouse B on September 6, 1973, para. 25, Appendix C.

Assuming portions of the amended complaint which are uncontradicted by Little's own sworn statements apply to Little, the complaint at most establishes that 1) Little accepted placement in segregated safekeeping status because of fear of violent or sexual assault by gang-affiliated inmates in the general population; 2) while in segregated safekeeping plaintiff was deprived of those privileges only available to prisoners in the general population; 3) he witnessed incidents of intimidation of other prisoners in

safekeeping by prisoners who remained outside the segregated cells; 4) he requested defendants to take action against these abuses which they did not do; and 5) during the cellhouse takeover on September 6, 1973, rebellious inmates terrorized plaintiff who witnessed sexual assaults on three inmates and had some of his property stolen.

The issue then, as previously stated, is whether plaintiff could maintain a cause of action for damages based on 1) deprivations suffered because of his status in protective segregation; 2) his sense of fear and intimidation caused by witnessing or hearing of assaults on others; and 3) the loss of property and exposure to rebellious prisoners during the September, 1973, mutiny.

Petitioner has contended in Part IV of the Petition for Writ of Certiorari that the facts established by the pleadings were not clearly violative of the constitutional rights of plaintiff during the period from 1972-1974. Therefore, under the principles of *Wood* v. *Strickland*, 420 U.S. 308 (1975), money damages could not be assessed.

The District Court rightly ignored those general allegations which clearly did not apply to Malcolm Little. The deprivations here complained of, when imposed on inmates in punitive or investigative segregation status, do not rise to the level of a violation of constitutional rights. *See, e.g., Gardner* v. *Thompkins*, 464 F. 2d 1031 (5th Cir. 1972) (recreation); *Cooper* v. *Pate*, 382 F. 2d 518 (7th Cir.) (corporate religious services); *McLaughlin* v. *Royster*, 346 F. Supp. 279, 311 (E.D. Va. 1972) (job, schooling, training assignment); *Estelle* v. *Gamble*, ——U.S.——, 97 S. Ct. 285 (1976) (medical treatment); *Wilson* v. *Prasse*, 325 F. Supp. 9 (W.D. Pa. 1971) (nutritionally sound food). The only law on deprivation of the privileges of the general population for those in volun

tary safekeeping status because of perceived threats in the general population favored the defendants. *Breeden* v. *Jackson,* 457 F. 2d 578 (4th Cir. 1972) No case had suggested that individual liability of prison officials would lie for the intimidating atmosphere visited on prisoners by their fellow inmates. *Holt* v. *Sarver,* 442 F. 2d 304 (8th Cir. 1971), cited by respondent, involved injunctive relief and can be distinguished in any case because the terrorizing trusties were clearly agents of the state. And responding trusties were clearly agents of the state. And respondent cites no case holding prison officials liable for damages to prisoners or their belongings as a result of a sudden prison insurrection by inmates.

While the presence of "dangerous" inmates is endemic to the prison setting, in this case, by celling each segregated prisoner separately, prison officials in fact provided maximum protection until they were overwhelmed in the September 6, 1973 mutiny. Plaintiff alleged no facts and could not which would indicate the gross negligence or deliberate act necessary to hold prison officials responsible for the damages sustained in the riot. See, *e.g., United States ex rel. Miller* v. *Twomey,* 479 F. 2d 701 (7th Cir. 1973).

Petitioner is, of course, aware that the amended complaint could be treated as superseding the original and supplementary complaints and affidavits,* 71 CJS PLEADING, § 321, *Bullen* v. *DeBretteville,* 239 F. 2d 824, 833 (9th Cir. 1956); *Nisbet* v. *Van Tuyl,* 224 F. 2d 66, 71 (9th Cir. 1955). Or it could be treated as a supplementary complaint,

*To do so, of course, would eliminate *all* specific allegations with respect to the plaintiff.

as it alleges new claims and matters occurring after the filing of the original and supplemental complaints. See, *e.g., United States* v. *Ruben,* 313 F. 2d 673 (9th Cir. 1963). In such cases the affidavits would stand as part of the original and supplementary pleading, Fed. R. Civ. Proc. R. 10. Where an affidavit and the general allegations of the pleadings conflict, the affidavit must control. See, *Nishimatsu Construction Co., Ltd.* v. *Houston National Bank,* 515 F. 2d 1200 (5th Cir. 1975), *Foshee* v. *Daoust Construction Co.,* 185 F. 2d 23 (7th Cir. 1950).

In any case, whether the sworn statements of plaintiff Malcolm Little are considered part of the pleadings, and were appropriately considered on a motion to dismiss, or are an independent part of the record requiring that the dismissal in this case be treated as summary judgment under Federal Rules of Civil Procedure, Rule 56, their import cannot be ignored. It would elevate form over substance to sustain the Seventh Circuit's decision and force these defendants to trial when those remaining allegations which are not directly contradicted by Malcolm Little's own words do not state a cause of action for damages.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General,
188 West Randolph Street - Suite 2200,
Chicago, Illinois 60601,
Attorneys for Petitioners.

JOAN BAINBRIDGE SAFFORD,
Assistant Attorney General,
Of Counsel.

APPENDIX A

Complaint and Affidavit filed January 17, 1973

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
CHICAGO, ILLINOIS

MALCOLM L. LITTLE, JR., and all others SIMILARLY SITUATED (Plaintiffs) vs. John J. Twomey, Warden Joliet Correctional Complex, Stateville (Defendants)	CLASS ACTION CIVIL RIGHTS SUIT

PETITION FOR CLASS ACTION
(Jurisdiction) **CIVIL RIGHTS SUIT**

Comes now, Malcolm L. Little, Jr., Plaintiff herein, who hereby files within the above named court a pleading in the nature of a petition for a civil rights suit pursuant to the United States Code, Title 42, Section 1983 and 1985 thereto.

INTRODUCTION

This suit is brought by plaintiffs (Malcolm L. Little, Jr., and all others similarly situated) for redress of a substantial deprivation of their rights provided by the Eighth and Fourteenth Amendments to the United States Constitution which they have had or will have had suffered by Warden John J. Twomey's intentional, bad faith exercise of his state official power as Warden of the Illinois State Penitentiary, Stateville Branch, Illinois.

STATEMENT OF FACTS

Plaintiff, Malcolm L. Little, Jr., was sentenced to the Illinois State Penitentiary to a term of not less than five (5) years nor more than twelve (12) years for the offenses of armed robbery and attempt rape, respectfully, in the Circuit Court of Cook County, Illinois, and has been incarcerated continuously since August, 1969.

Plaintiff, having been subjected to a murderous beating, kicking, stomping in the Vienna Correctional Center, Vienna, Illinois on September 15, 1972, was thereafter, on the aforesaid day at 10:00 p.m. arbitrarily and capriciously transferred to Menard Branch on an emergency administrative order, in which he was denied his opportunity to secure his release on parole for one (1) additional year on November 15, 1972, because of the Vienna attacks upon his person for which he was transferred.

On September 15, 1972, plaintiff, while in Vienna in the presence of two other caucasian inmates, Hank Dunn and Fred Dailey, who were not transferred from Vienna, was physically attacked by seven (7) or eight (8) Negro inmates, all of whom were members of the Satan's Gangster's Black Disciples, Chicago street gang, for no apparent reason other than racial hatred.

The racial ratio in both Vienna and Menard is approximately fifty percent Negro, which did, to a certain degree, afford plaintiff a minimal degree of safety from recurring murderous assaults. However, on December 6, 1972, after considerable remonstrance to Mr. Peter B. Bensinger, Director department of corrections, in the form of correspondence, of which plaintiff has his original copies and the director's replies, Mr. Bensinger and Mr.

Monahan, assistant director, refused to cancel the transfer to Stateville, although plaintiff unequivocally apprised Mr. Bensinger in correspondence of November 7, 1972 (plaintiff now has a carbon copy, together with the director's reply thereto) that his life and safety would be in imminent danger if he were to be returned to Stateville Branch.

Even a cursory inspection of Stateville's current racial ratio will reveal that it is at least 70 percent Negro, most of whom are affiliated with Black street gangs. A substantial number of the gang members are affiliated with the Gangster's Black Disciples; in fact, one of whom has been returned to Stateville from Vienna, in which he was passively involved in the murderous attack upon plaintiff. Therefore, it would be virtually impossible for plaintiff to be placed in the Stateville general population without recurring attacks by gang members here. To this very date, January 1, 1973, even though plaintiff's contacts with general population have been minimal, he has received numerous threats from these gang members because of what transpired in Vienna.

Within five days after plaintiff's return to Stateville, on December 13, 1972, he was advised by cell house "B" officers, in which transfer gallery is located, that he would be required to accept an institutional assignment in the clothing room, which, at last tally, had seventeen (17) Negroes and one (1) caucasian assigned thereto. Immediately, after refusing this assignment for personal reasons in regard to his life and safety, plaintiff was locked up in investigation for one (1) night. Captain Martin P. Shifflet, who is in charge of assigning transferees, should have been aware of the obvious security problem entailed

by such an assignment; yet, I was afforded absolutely no alternatives with regard to assignment. Moreover, Captain Shifflet, having access to all prisoners' records, undoubtedly was cognizant of the Vienna incident.

Early the following morning, December 14, 1972, plaintiff was summoned to the isolation unit, in which he appeared before a disciplinary committee which consisted of the following persons: Captain A. J. Pollmann, Officer R. Jones and Mr. Wl. Tucker. When apprised of plaintiff's fear for his life and safety in the Stateville institution, more specifically, the clothing room, Captain A. J. Pollman departed from the room briefly. Upon re-entering the room, he attempted to discredit plaintiff's fear for his life and safety by stating: "that he did not believe that the problem was too serious." Plaintiff had apprised the disciplinary committee on two (2) consecutive days, December 13 and 14, respectively, that one of his assailants in Vienna was presently in Stateville.

In an interview with Mr. Eugene McCarney, Counselor, Clinical Services, Stateville Branch, with whom plaintiff is acquainted, plaintiff apprised Mr. McCarney of his qualms with regard to entering a very unsafe, extremely hostile, and predominantly Negro environment, in which his safety and life would be endangered. After hearing facts regarding plaintiff's situation, Mr. McCarney advised him that there seemed to be sufficient grounds for a safekeeping lock-up. During the disciplinary committee hearing, plaintiff advised the three members of the committee with regard to his conversation with Mr. McCarney. Even with this knowledge, the committee threatened to place plaintiff in the hole.

Ultimately, without being offered any alternatives, plaintiff was psychologically coerced into signing a slip captioned "Segregation Safekeeping" which states: "I, inmate ....., refuse any placement in the general population at this institution and I am voluntarily requesting to be placed in Segregation Safekeeping for my own safety and welfare." Copies of this slip are disseminated to the assignment committee, clinical services, RI & D center, record office, and one inmate copy.

It is plaintiff's contention that, if the general population were even reasonably safe, nobody would have sufficient motive to lock themselves up for their own welfare. (Reference is drawn to the number of inmates, most of whom are white, who are currently locked up in safekeeping in cell house "B", Six (6) gallery). However, as superficial scrutiny will disclose, gangs are permitted to run rampant in Stateville without sufficient restraint to afford adequate protection from sexual attacks, murderous batteries, commissary thefts, etc., all of which is tacitly promoted by the failure to prosecute perpetrators for these unlawful and atrocious offenses. If the gangs attack officers, as is frequently the case, they do receive some sort of punishment; whereas, if they elect to literally rip-off other inmates, it seems to be done with apparent impunity, which amounts to concealment on the part of officials.

It is only in sheer desperation and abject resignation that an inmate consigns himself to safekeeping-segregation status; moreover, if suitable alternatives were available, which would afford reasonable safety to the inmates, the institution could abolish this so-called voluntary safekeeping. Segregation, in contrast to the general population, precludes an inmate from exercising indoors or outdoors,

attending religious services, using legal materials in the law library, eating his meals under semi-sanitary conditions, and even keeping his cell clean because of the lack of a broom or mop – brooms and mops are impermissible items in segregation.

It is plaintiff's further contention that the prison sentence that is imposed is a term of years, regulated by statute, to the general population of the penal institution; furthermore, to have a harsher punishment inflicted would be, in effect, to negate the safeguards that are built into the judicial sentencing process. If Stateville provided any semblance of security for inmates, then absolutely no prisoner of normal intelligence would voluntarily expose himself to a form of punishment, segregation, which in essence is far harsher than general population. Therefore, it is plaintiff's contention that this so-called voluntary safekeeping is in fact involuntary and a last resort to protect oneself from murderous attacks, sexual assaults, and other daily rip-offs.

Plaintiff, as well as other inmates have been denied access to the law library and the legal materials therefrom while they are in segregated status. In addition, without these legal materials, e.g., typewriter, paper, law books, etc., the inmates on segregation status are totally denied access to the courts, habeas corpus, post-convictions, and other collateral legal proceedings. In spite of the fact that the rule book, April, 1972, makes provisions for segregated inmates to have access to the law library, the privilege is simply not adhered to. Attached hereto, in support of this law library denial, is a copy of a petition which has been circulated to the appropriate institutional officials.

ADDENDUM TO STATEMENT OF FACTS

Since initially preparing the statement of facts herein, it has come to my attention through personal observation, that this Lock-Up gallery in cell house "B", 6 gallery, is only partially safe at best; for instance, plaintiff has personally witnessed no less than two (2) attacks and actual batteries upon persons who have literally given up their privileges to be safe; moreover, from his open cell bars, through which voices are quite audible, plaintiff is in a position to observe threats and attempted attacks by other inmates, who are not in this Lock-up, on an ongoing, continual basis.

It seems ironic that inmates, who adjusted exceedingly well to the general populations of other institutions, are simply required to lock themselves up with no alternatives provided them which would insure their reasonable safety. Moreover, there is currently in operation a special treatment unit (segregation) SPU in Joliet, to which intractable prisoners are sent for serious or frequent rule violations: men who exhibit a chronic inability to adjust.

During the past two weeks, since I have been on Lock-up for my own safekeeping, several other prisoners, who are similarly situated, have shown me commitment recommendations from the institutional assignment, whose Chairman is Captain Martin P. Shifflet, committee, advising them that they are scheduled to be transferred to this aforesaid special treatment unit because prisoners refused an assignment proffered since their safety would have been thereby imperiled. It is plaintiff's contention, which may be supported by myriad witnesses, including some institutional employees, that the prisoners who received such recommendations, did not refuse any place-

ment, but only assignment placement in the general population which would endanger their lives or the lives of other prisoners and which would inevitably jeopardize their chances for parole thereby.

In most cases, the prisoners in this predicament were merely given an ultimatum, which at best was limited to two or three very unsafe assignments, before receiving notice for said special segregation unit in Joliet Branch. Plaintiff contends that the injunctive power of the Honorable Court should be invoked forthwith precluding such transfers until a massive investigation is initiated into this egregious misuse of any special program and/or segregation unit. To place a prisoner in such a segregation unit for intractable prisoners, when he in fact has been guilty of no rule infraction, under the pretext of "his own safety or safekeeping" irreversibly offends even primitive concepts of human decency and sensibilities; moreover, such placement in a special segregated unit would be inevitably tantamount to extremely cruel and unusual punishment, particularly when the afflicted person (prisoner) has done absolutely nothing except to request that he be provided safety. Why does the institutional policy refuse to acknowledge the current lawlessness which thoroughly pervades this institution? In addition, until this lawless situation is rectified, why do the institutional officials fail to provide the afflicted with reasonable alternatives; institutional transfers, etc., to segregated status which is tantamount to punishment no matter what appelation or designation is attached to it. Reference is drawn to the fact that many of these men, including the plaintiff, effected excellent adjustments in other institutions and participated in numerous constructive activities; yet, at this time, they are being subjected to punishment while the gangs run rampant; is this equitable?

Once again, Plaintiff draws reference to the segregation unit in which he presently resides and the loss of many privileges; whereas a person who is residing in this segregation status is still subjected to attacks in places such as the shower room, etc.

ALLEGATIONS FOR CIVIL RIGHTS COMPLAINT

(No. 1)

That during all times herein mentioned, John J. Twomey, Warden, while acting under color of his state office, Warden, did intentionally act in bad faith to deprive substantially Malcolm L. Little, Jr., of his right provided under the Eighth (8th) Amendment to the United States Constitution to be free from cruel and unusual punishments *when defendant, by failing* to provide reasonable safety in the Stateville general population, psychologically coerced plaintiff to sign in desperation a slip consigning himself to a segregated status, wherein he does not receive many of the privileges of the general population, in spite of the fact that plaintiff has been guilty of no misconduct.

(No. 2)

That during all times herein mentioned, John J. Twomey, Warden, while acting under color of his state office, Warden, did intentionally act in bad faith to deprive substantially Malcolm L. Little, Jr., of his right provided under the Fourteenth (14th) Amendment to the United States Constitution to the due process of all laws *when defendant* prohibited plaintiff from having access to the law library and the legal materials therein.

COMPLAINT

The aforesaid substantial deprivations involved in this civil suit injured plaintiffs, as follows:

1. Total loss of institutional mobility and participation in any recreational activities.
2. Loss of work opportunities of a rehabilitative nature.
3. Loss of schooling and training opportunities.
4. Great mental anguish.
5. Denial of access to law materials and supplies.
6. Needless degradation.
7. Loss of opportunity to attend religious services.
8. Loss of opportunity to eat warm food in the dining room.
9. Inadequate sick call procedure on segregated status.

JUDGMENT

The evidence shows that plaintiffs have been, and are being, substantially deprived of their rights provided by the United States Constitution. In redress for these deprivations, plaintiffs pray this Court will direct the Warden to bear the legal responsibility of plaintiff's prayer for relief, as follows:

A. That this Court's injunctive power will be invoked for the purpose of ensuring that inmates, who are segregated for their own safety, will be provided with reasonable alternatives in which safety will be afforded them.

B. That this Court's injunctive power will be invoked for the purpose of preventing sexual assaults, murderous attacks, and other rip-offs, or in the alternative, to enjoin the institutional officials to expose, publicize, and prosecute institutional offenses as prescribed in the Illinois Criminal Code.

C. That this Court's injunctive power will be invoked for the purpose of enjoining institutional authorities to refrain from inflicting punishments in reprisal (both subtle or overt) for this suit.

D. That this Court's injunctive power will be invoked for the purpose of ensuring that prisoners in segregated status will be afforded access to the law library and the materials therein at all reasonable times.

/s/ MALCOLM L. LITTLE, JR.
Plaintiff, Malcolm L. Little, Jr.

Subscribed and sworn to before me this 5th day of January, 1973, A.D. My Commission expires November 14, 1976.

/s/ EDWIN J. MEYER
Public Notary

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

AFFIDAVIT IN SUPPORT OF CIVIL RIGHTS SUIT ALLEGATIONS

Comes now, Malcolm L. Little, Jr., Affiant herein, who, being first duly sworn upon oath, doth depose and state:

1. That I was sentenced to a term of five to twelve years at the Illinois State Penitentiary, Stateville Branch, Joliet, Illinois, and John J. Twomey is the Warden at said penitentiary.

2. That said Warden fails to employ adequate security measures to ensure the safety of inmates in aforementioned penitentiary.

3. That several inmates in segregation-safekeeping have been psychologically coerced to place a so-called voluntary signature on a slip of paper which exposes them to harsher treatment because of the total lack of alternatives to such placement.

4. That said Warden has been depriving inmates in segregation of their constitutional right to access to the Courts by denying them use of the law library.

5. That I have attached a Motion for an evidentiary hearing so that an open court hearing can be held to examine into the above charges.

Wherefore, I, Malcolm L. Little, Jr., Affiant herein, understand that I am liable for perjury were I to give false testimony in the above affidavit.

/s/ MALCOLM L. LITTLE, JR.
Affiant, Malcolm L. Little, Jr.

Subscribed and sworn to before me this 5th day of January, A. D. My Commission expires March 14, 1976.

Public Notary
/s/ EDWIN J. MEYER

APPENDIX B

February 28, 1973

Supplemental Complaint and Affidavit Filed

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MALCOLM L. LITTLE, JR., DOMINICK TROMBETTA, DALE J. ALLEN, VINCENT F. PROVENZANO, RICHARD L. WHITLEY, and DAVID STANLEY SWANEY, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

JOHN J. TWOMEY, et al., Warden, Joliet Correctional Complex, Stateville Branch, Illinois Penitentiary,
Defendants.

Civil No. 73 C 134

PLAINTIFF'S SUPPLEMENTAL COMPLAINT AND MEMORANDUM OF LAW IN CIVIL RIGHTS SUIT

Plaintiff Malcolm L. Little, Jr., when commencing Civil No. 73 C 134, was compelled to proceed pro se; therefore, since he is not a licensed attorney at law or legal scholar, certain deficiencies, of course, were inevitable. On the other hand, although Plaintiff Little was somewhat vague

with regard to the proper members of the class, plaintiffs pray that the instant cause will be sustained by the honorable court as a class action civil rights suit pursuant to Federal Rules of Civil Procedure, Rule 23 and in support whereof:

Named plaintiffs are members of a class of inmates confined to segregation-safekeeping (protective custody), all of whom are Caucasian and thirty years old or under, who are presently, owing to their status on safekeeping unit, being denied "equal treatment" afforded nonsegregated inmates. Furthermore, none of these inmates have violated any institutional rule or regulation which would serve to justify the "Unequal" treatment to which they are presently being subjected. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all persons constituting the above described class who are similarly situated. The persons in the class are so numerous that joinder of all persons therein is impractical. There are questions of law or fact common to the class, the claims of the representatives are typical of the claims of the class, and the representatives will fairly and adequately protect the interests of the class.

All of the plaintiffs herein and members of their class have been the victims of racial beatings, sexual attacks, or commissary extortions, which has necessitated their placement in safekeeping segregation. Plaintiffs, owing to the Stateville Branch exceedingly high ratio of black inmates, most of whom are gang members, are presently in fear for their very life and safety in this institution. Plaintiffs further maintain that although every member of their class has been a victim of this gang violence, there have been no prosecutions by the Will County Offi-

cials; in fact, these acts of violence by black gangs have been for the most part condoned. Therefore, the Defendants' contention that all acts of violence are prosecuted is prima facie false. In support thereof, plaintiffs can produce medical records and witnesses to these racial attacks for which prosecution was never instituted. Institutional craimes which are perpetrated by inmates against other inmates are not published, prosecuted, etc.

Plaintiff Malcolm L. Little, Jr. asserts that the Defendants falsely stated that he had allegedly been threatened by other persons in his segregated unit. However, plaintiff Little did allege in the original complaint that, since inmates from non-segregated galleries encompassing the safekeeping unit are inadequately separated from those inmates in safekeeping (inmates who are not in segregation are housed on two galleries below him and whose voices are audible through the open cell bars), he has been continually harassed by Black inmates (nonsegregated), who walk the first floor, thirty (30) feet below his cell, and on occasion have threatened to throw gasoline into his cell. The insinuation that plaintiff Little had been verbally threatened by inmates in protective custody (safekeeping) is patently false.

In addition, Defendants' assertion that plaintiffs have failed to state a claim upon which relief can be granted is obviously untrue, and the plaintiffs' prayer for injunctive relief should issue and the cause should prevail on its merits for the following reasons:

[Memorandum of law deleted.]

Respectfully submitted,

/s/ MALCOLM L. LITTLE, JR.
Malcolm L. Little, Jr.

/s/ DOMINICK TROMBETTA
Dominick Trombetta

/s/ DALE J. ALLEN
Dale J. Allen

/s/ VINCENT F. PROVENZANO
Vincent F. Provenzano

/s/ RICHARD L. WHITLEY
Richard L. Whitley

/s/ DAVID STANLEY SWANEY
David Stanley Swaney

AFFIDAVIT

Plaintiffs herein do hereby depose and state that the foregoing information contained herein is true both in substance and in fact to the best of their knowledge, and that currently all of the above plaintiffs are confined in segregation-safekeeping in the Stateville Branch of the Illinois State Penitentiary and that they are proper members of the class herein referred to.

/s/ MALCOLM L. LITTLE, JR.
Malcolm L. Little, Jr. – Affiant

Subscribed and sworn to before me this 28th day of February, 1973, A. D. My Commission expires November 14, 1976.

/s/ EDWIN J. MEYER
Notary Public – Stateville Branch

APPENDIX C

First Amended Complaint Filed November 30, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MALCOLM LITTLE, JR., RICHARD L. WHITLEY, individually and on behalf of all other persons similarly situated,
Plaintiffs,
vs.
DANIEL WALKER, individually and as Governor of the State of Illinois, ALLYN R. SIELAFF, individually and as Director of the Department of Corrections, PETER B. BENSINGER, individually, JOSEPH G. CANNON, individually and as Warden of the Stateville Branch of the Illinois State Penitentiary, JOHN J. TWOMEY, individually, VERNON REVIS, individually and as Superintendent of the Stateville Branch of the Illinois State Penitentiary, GEORGE J. STAMPAR, as Administrative Assistant to the Warden of the Stateville Branch of the Illinois State Penitentiary, MARTIN P. SHIFFLET, individually and as Chairman of the Assignment Committee of the Stateville Branch of the Illinois State Penitentiary, J. LIETHLIGHTER, G. HUSTON, J. McFADDEN, A. J. POLLMAN, R. JONES, W. TUCKER, individually and as members of the Disciplinary Committee of the Stateville Branch of the Illinois State Penitentiary, and the DEPARTMENT OF CORRECTIONS of the State of Illinois,
Defendants.

No. 73C134 and related cases.

FIRST AMENDED COMPLAINT

Plaintiffs, Malcolm L. Little, Jr., and Richard L. Whitley, individually and on behalf of other persons similarly situated, pursuant to leave of Court granted on October 16, 1973, for their first Amended Complaint, say as follows:

[Statement of jurisdiction and parties omitted]

VI. FACTUAL ALLEGATIONS

16. Before their classification into "Safekeeping-Segregation" status, plaintiffs repeatedly suffered acts and threats of physical violence, sexual assaults, and other crimes perpetrated by other inmates from whom plaintiffs were not reasonably protected by defendants. During their placement in the general population of inmates at Stateville, plaintiffs lived in constant and imminent fear of such violence and sexual assaults, especially when inflicted by gang-affiliated inmates.

17. Defendant, Captain Shifflet, ordered plaintiffs to work in certain areas of Stateville effectively controlled by gang-affiliated inmates who repeatedly threatened, and inflicted on plaintiffs, acts of physical violence and sexual assaults. Fearing for their personal safety, plaintiffs refused to comply with such work assignments. Upon their refusal, plaintiffs were committed to isolation and suffered other grievous punishment at the direction of the Disciplinary Committee.

18. In order to escape the constant threat of (1) violence and sexual assaults associated with placement in the general prison population and (2) repeated punishment by the Disciplinary Committee for refusal to accept assignments in areas of Stateville controlled by gang-affiliated inmates, plaintiffs were compelled to accept placement in "Segregation-Safekeeping" status. Plaintiffs' acceptance of placement in "Segregation-Safekeeping" status was coerced by the pervasive climate of fear which defendants permitted to exist in the general prison population by failing to control violence-prone inmates, and especially gang-affiliated inmates.

19. Since May 24, 1972, defendants have classified plaintiffs in "Segregation-Safekeeping" status for varying periods of time, in some instances in excess of one year.

20. By their imposition of "Segregation-Safekeeping" status on plaintiffs, defendants have caused plaintiffs to suffer grievous loss by reason of prolonged segregated confinement and numerous other restrictions and deprivations, including, but not limited to:

(a) Denial of access to religious services, ministrations, and sacraments;

(b) Denial of all opportunities of a rehabilitative nature, including educational and vocational instruction;

(c) Denial of adequate medical and dental treatment;

(d) Denial of adequate means with which to maintain their cells in a clean and sanitary condition;

(e) Denial of essentials necessary for personal hygiene, including access to shower facilities at least once a week;

(f) Denial of access to the prison dining room or to warm food served in a sanitary manner;

(g) Denial of all indoor or outdoor recreational activity;

(h) Denial of effective access to the prison law library and the legal materials contained therein;

(i) Denial of opportunities for parole, work release program or transfer to a minimum security unit or institution.

21. By reason of defendants' imposition of "Segregation-Safekeeping" status on plaintiffs, defendants have confined plaintiffs in or near Gallery 6 of Cell House B at Stateville where defendants also confine inmates in disciplinary segregation. Defendants place inmates in disciplinary segregation if they indicate a chronic inability to

adjust in the general prison population, if they constitute a serious threat to the security of the institution, or if other inmates require maximum protection from them. On information and belief, defendants place the inmates most prone to violence in Cell House B and particularly in or near Gallery 6 of Cell House B, where inmates in disciplinary segregation are kept along with inmates in "Segregation-Safekeeping" status.

22. By reason of defendants' imposition of "Segregation-Safekeeping" status on plaintiffs, defendants have inflicted upon plaintiffs precisely the same punitive restrictions and deprivations as are imposed on inmates confined in disciplinary segregation for violations of prison rules or regulations.

23. By reason of defendants' imposition of "Segregation-Safekeeping" status on plaintiffs and defendants' placement of plaintiffs in Gallery 6 of Cell House B along with inmates in disciplinary segregation and inmates who are especially prone to violence. defendants have denied plaintiffs reasonable protection from repeated acts and threats of sexual assault and violent acts by other inmates, especially gang-affiliated inmates.

24. Defendants require that all of plaintiffs' meals be served to them in their cells and permit plaintiffs' meals to be served to them by inmates who are gang-affiliated and who intimidate plaintiffs and threaten to withhold meals from plaintiffs unless plaintiffs perform unnatural sexual acts through the cell bars. On information and belief plaintiffs have repeatedly been deprived of meals or coerced to perform unnatural sexual acts in this manner. Defendants, their agents and employees have refused to take any action to correct such abuses despite requests by plaintiffs.

25. By reason of defendants' classification of plaintiffs in "Segregation-Safekeeping" status and their placement of plaintiffs in Cell House B along with inmates who are prone to violence. inmates who are gang-affiliated, and inmates who are classified in disciplinary segregation, defendants have caused plaintiffs to suffer injury to their person and damage to their property. In particular, on or about September 6, 1973, defendants failed to afford reasonable protection to plaintiffs. As a consequence, Cell House B was seized by a group of inmates, many of whom were either in disciplinary segregation or were gang-affiliated. The rebellious inmates forced all of the inmates in Cell House B, including plaintiffs, to leave their cells. During the approximately nine hours that Cell House B was in control of the rebellious inmates, several plaintiffs, including Dennis Heinz, Dennis Erlandson, and Robert Drake suffered "gang rapes". Plaintiffs Drake and Erlandson required hospitalization as a result of these attacks by other inmates. Other plaintiffs also suffered acts and threats of physical violence and sexual assault and damage to their personal property, including the destruction and confiscation of legal materials.

26. The level of tension in Cell House B remains extremely high following the rebellion of September 6, 1973. Plaintiffs suffer constant fear of further imminent seizures of Cell House B by other inmates, especially gang-affiliated inmates, from whom they seek protection.

27. Plaintiffs have requested defendants to transfer them to other institutions, but defendants have refused each such request.

28. The conditions, abuses, deprivations, and restrictions to which plaintiffs have been subject were arbitrarily and unreasonably imposed. They shock the conscience of civilized man and are grossly disproportionate to any offense. They are unrelated to and unjustified by any proper penal objective or purpose.

VII. FIRST CAUSE OF ACTION

29. As a proximate and direct result of the aforesaid acts and omissions of defendants, their agents and employees, acting in their official capacities, under the color of State law, plaintiffs have been deprived of their Federal Constitutional rights to Due Process of Law.

30. No adequate state justification exists for the arbitrary denial of plaintiffs' Federal Constitutional rights to Due Process of Law.

VIII. SECOND CAUSE OF ACTION

31. As a proximate and direct result of the aforesaid acts and omissions of defendants, their agents and employees, acting in their official capacities, under the color of State law, plaintiffs have been deprived of their Federal Constitutional rights to Equal Protection of the Laws.

32. No rational basis exists for the arbitrary denial of plaintiffs' Federal Constitutional rights to Equal Protection of the Laws.

IX. THIRD CAUSE OF ACTION

33. As a proximate and direct result of the aforesaid acts and omissions of defendants, their agents and employees, acting in their official capacities, under the color of State law, plaintiffs have been deprived of their Federal Constitutional rights to be free from Cruel and Unusual Punishment.

X. FOURTH CAUSE OF ACTION

34. As a proximate and direct result of the aforesaid acts and omissions of defendants, their agents and employees, acting in their official capacities, under the color of State law, plaintiffs have been deprived of their Federal Constitutional rights to free exercise of their religion, freedom of speech, and freedom of assembly.

IX. FIFTH CAUSE OF ACTION

35. As a proximate and direct result of the aforesaid acts and omissions of defendants, their agents and employees, plaintiffs have been deprived of their constitutional rights under Article I, Sections 2, 3 and 11 of the Constitution of the State of Illinois (1970).

36. As a proximate and direct result of the aforesaid acts and omissions of defendants, their agents and employees, plaintiffs have been subjected to conditions, abuses, deprivations and restrictions in violation of the Unified Code of Corrections, Chapter 38, Section 1001-1-1, et seq., of the Illinois Revised Statutes (1972 supp), including, but not limited to, the following sections of Chapter 38:

(a) Section 1003-6-2(d), requiring the Department to provide educational programs for all committed persons;

(b) Section 1003-7-2(a), requiring the Department to provide every committed person with access to toilet facilities, barber facilities, bathing facilities at least once a week, and a library of legal materials.

(c) Section 1003-7-2(b), requiring the Department to provide facilities for every committed person to leave his cell for at least one hour each day;

(d) Section 1003-7-2(c), requiring the Department to provide every committed person with a wholesome and nutritional diet at regularly scheduled hours, drinking water, clothing adequate for the season, bedding, soap and towels, and medical and dental care;

(e) Section 1003-7-2(f), requiring the Department to permit religious ministrations and sacraments to be available to every committed person;

(f) Section 1003-8-7(b), prohibiting disciplinary restrictions on diet and permitting disciplinary restrictions on clothing, bedding, mail, visitations, the use of toilets, washbowls and showers only for abuse of such privileges or facilities.

XII. DAMAGES

37. Each of the defendants acted with malice or with reckless disregard for the rights of plaintiffs in violation of the Constitution and laws of the United States, the Constitution and laws of the State of Illinois, and the rules and regulations of the Department.

38. Defendants Walker, Director Sielaff, Director Bensinger, Warden Cannon, Warden Twomey, Supt. Revis and Asst. Stampar knew or should have known of the aforementioned abuses, conditions, deprivations and restrictions inflicted on plaintiffs, and failed to prevent such abuses or correct such conditions, deprivations and restrictions.

39. As a result of the aforesaid violations of their rights, plaintiffs have suffered great bodily pain and injury and severe mental and emotional pain, anguish, humiliation and degredation, and will continue so to suffer in the future. They have further suffered a loss of educational and rehabitational opportunities and loss or damage to their personal property. Their classification in "Segregation-Safekeeping" status will impede their eventual release from prison as well as their future well-being both in prison and without.

40. By reason of the foregoing acts, plaintiffs have each been damaged in the amount of $25,000.00.

41. Plaintiffs have no plain, adequate, or complete remedy at law to redress the wrongs alleged herein. Plaintiffs are now suffering and will continue to suffer irreparable injury from defendants' acts, policies and practices unless they are granted the relief prayed for herein.

DEMAND FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

• • •

[Demand for declaratory and injunctive relief, dismissed as moot November 8, 1974, omitted]

III. Award monetary damages in the sum of $25,000.00 to each plaintiff as compensatory damages for his individual injuries and $10,000.00 as punitive damages to each plaintiff.

IV. Order defendants to pay the costs of this suit and reasonable attorneys' fees to the plaintiffs.

V. Grant such other and further relief as this Court deems just and proper.

MALCOLM L. LITTLE
RICHARD L. WHITLEY
By: DANIEL R. MURRAY,
One of their attorneys.

JEROLD S. SOLOVY
RICHARD C. BOLLOW
DANIEL R. MURRAY
ROBERT L. GRAHAM
JENNER & BLOCK
Attorney for Plaintiffs
ONE IBM PLAZA
Chicago, Illinois 60611
222-9350